In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 529

LAWRENCE RAYMOND KING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 11-19; R. I, 34) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1965 (Pet. 20; R. I, 43). A petition for rehearing was denied on August 4, 1965 (Pet. 21; R. I, 44). The petition for a writ of certiorari was filed

on September 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied a fair trial by the trial court's refusal to grant a continuance to permit him to examine a witness who knew an informant's identity, when petitioner consistently refused to indicate (outside the presence of the jury) what his defense would be or how the identity of the informant would be material to that defense.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted under a two-count indictment charging the smuggling of approximately 500,000 amphetamine tablets into the United States, and the concealment of the tablets with knowledge of illegal importation, in violation of 18 U.S.C. 545. He was sentenced to imprisonment for three years and to pay a $1000 fine on each count, the prison terms to run concurrently (R. I, 25).

The evidence showed that at about 11:30 p.m. on March 6, 1964, as petitioner drove a Cadillac automobile across the border from Mexico, he was placed under surveillance by United States Custom Agent Maxcy and other agents, followed some 8 miles, stopped, and the vehicle searched. In a specially built metal compartment in the trunk of the automobile, the agents found the 500,000 amphetamine tablets. Agent Maxcy,

earlier that evening, had received information from his superior that petitioner had gone to Tijuana for the purpose of acquiring a large amount of amphetamine pills; that he would cross the border between 11 and 11:30 p.m., driving one of two automobiles described as to model, color and license number; and that, on the first of the probable three trips he would make, he would conceal the contraband in an area that was reached on the road just prior to the point where he was stopped by the agents (Tr.[1] 5-10; 32-40; 53-55).

A month after indictment, petitioner filed a motion to suppress evidence as having been illegally seized, and a motion for a bill of particulars requesting the identity of the persons who knew he was entering the country with the pills (R. I, 6). At a hearing on the motions, defense counsel asserted that he was seeking the name of the informant (Tr. 3-4; 31). The court heard testimony by Agent Maxcy, ruled that the evidence had been seized legally during a border search, and found it unnecessary to decide whether the identity of the informant need be disclosed in order to question the existence of probable cause (Tr. 26-28).

At trial petitioner renewed his contention that the evidence had been illegally seized (Tr. 37-38) and also asked for a hearing outside the presence of the jury to show that the identity of the informant was material to his defense (Tr. 43, 52). At this time Agent Maxcy[2], under questioning by defense counsel,

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[1] "Tr." references are to Volume II of the Record.

[2] Official reports made by Agent Maxcy to the United States Attorney were produced for the defense (Tr. 55-57).

testified that he had received information as to petitioner's intended entry from his superior, Agent Brockman, who in turn had received the information from a Federal Food and Drug Inspector Larkworthy in Los Angeles (Tr. 55). Defense counsel next called Inspector Larkworthy, who testified that he had received the information from an Inspector Sumega in his office and that it was his understanding that Sumega's source of information was Sergeant Goodwin of the Los Angeles County Sheriff's Office (Tr. 59-60). When counsel then indicated that he wanted Sergeant Goodwin produced, the court reminded him that he had not yet indicated how the identity of the informant might be helpful to his preparation or his defense (Tr. 63). Asked specifically "What is your defense?" (Tr. 64), counsel asked the court to "assume" that the government had not proved knowledge. When the court answered that it could not so assume on the basis of the evidence, counsel explained (Tr. 65):

> [Mr. Hughes]: I am not right now to the point where I am demanding the identity of the informer. I will say that we will eventually get there, but the only way I am going to reach it is this: All I want to do is to be given an opportunity to get Goodwin down here, and ask him what information he received, and at that point if I ask for the identity of the informer, then your Honor will be in a position to rule,
> * * *

The court answered that it would not grant a continuance until there was sufficient information before it to rule on the question whether the informant's

identity need be disclosed (Tr. 65). After further discussion, during which the court reiterated that it wished to know what the defense was, the court suggested that counsel speak to Goodwin during the noon recess (Tr. 66-67). After recess, when defense counsel informed the court that Goodwin had refused to discuss the matter and that a subpoena had been issued, the court suggested that it be ascertained whether Goodwin would be willing to disclose the identity of his source of information. It asked respective counsel if each would be willing to stipulate that Goodwin would refuse such disclosure and they answered affirmatively. Defense counsel added that his next step would be to urge that the government must elect to dismiss (Tr. 68-70). When defense counsel argued that he still needed Goodwin to show the extent of participation of the informant, the court granted a recess to permit counsel to reach the officer (Tr. 70-72). Thereafter the court was advised that Goodwin was on vacation but an attempt was being made to reach him (Tr. 72).

The following day counsel informed the court that while Goodwin had not been reached, contact had been made with Los Angeles County Deputy Sheriff Burman, who had been present at all discussions between Goodwin and the informant and who knew the informant. On the basis of Burman's statement, both counsel stipulated that Burman, if called, would refuse to supply detailed information which would reveal the identity of the informant and would also decline to state: (1) whether the informant was a resident of Los Angeles or Tijuana; (2) how close the in-

formant was to the venture; (3) whether the informant had revealed where and when the delivery of the tablets was to be made or where the tablets were picked up or placed in the car or who was present; and (4) whether the informant was present when the compartment in the trunk of the Cadillac was constructed (Tr. 95). The court indicated that it was not certain that it would allow the witness to claim the privilege as to certain of the proposed questions but that, in the posture of the case as it then stood, there was no reason for requiring the production of the evidence or the witness.

Defense counsel moved for a continuance to produce Burman or in the alternative for a dismissal. The court repeatedly indicated that if defense counsel wanted to produce evidence outside the presence of the jury to show how the informant might possibly assist the defense, it would hear the evidence. Defense counsel indicated he would rely on the record as it stood (See Pet. 18-19, fn. 7), and rested his case (Tr. 98).

ARGUMENT

Although given every opportunity to show how the name of the informant could possibly aid his defense, petitioner failed to do so.[3] At most he made the bare assertion that identity would be material on the ques-

[3] As both courts below properly held, since the right of a border search does not depend upon a showing of probable cause, the identity of the informant was not required to demonstrate such probable cause.

tion of how the pills were placed in the vehicle and how the compartment in the car was constructed, etc. (Tr. 52-53). He did not indicate any defense to which these questions might be material. He did not claim entrapment or lack of knowledge of the presence of the contraband, nor did he attempt to justify or explain its presence in any way. There was thus no reason for the court to require disclosure of the name of the informant or delay the trial. See *Rugendorf* v. *United States*, 376 U.S. 528.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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